No. 88.

FILED
DEC 27 1899
JAMES H. McKENNEY,
Clerk.

The Robert Clarke Company, Cincinnati. December, 1899.

Reply Brf. of Colston for P. E.
Filed Dec. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Baltimore and Ohio Southwestern Railway Company,

Plaintiff in Error,

No. 88. *vs.*

William Voigt,

Defendant in Error.

BRIEF IN REPLY TO POINTS MADE BY COUNSEL FOR DEFENDANT IN ERROR IN ORAL ARGUMENT.

EDWARD COLSTON,
Attorney for Plaintiff in Error.

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I.

Upon reaching my office to-day, returning from Washington, I discovered that the case of *Blank* v. *Illinois Central Railway Co.*, cited in my first brief (that having a white cover) at p. 9, the opinion being printed in full as an appendix to that brief, has been affirmed by the Supreme Court of Illinois, the opinion appearing in full in Vol. 55 Northeastern Reporter, No. 5, p. 332. The opinion has not been elsewhere printed, and to afford the court convenient access to it, it is reproduced here. The court said :

"The main question in the case concerns the validity and legal effect of plaintiff's contract. The ground of attack upon the contract is that it is void as against public policy. It is first argued that it is a contract of employment between the plaintiff and the express company, which is contrary to public policy, as exempting the employer from the consequences of its negligence. It is insisted that an employer cannot stipulate for immunity against his own negligence, and that a contract intended to have that effect is void, as tending to relax the employer's care, and to increase the perils of the occupation. The question thus sought to be raised has no relation to this case since the contract is not sought to be enforced for the the purpose of relieving plaintiff's employer, the express company, from the consequences of its negligence, or affording it immunity for its wrongful act. It is not alleged or claimed by any one that the employer was in fault, or neglected any duty towards the plaintiff. The question is whether the defendant had a right, in taking the express company and its business and employes upon its road, to make the contract that it should not be liable for the negligence of its employes. It is insisted that the plaintiff occupied the position of a passenger for hire, and that public policy will not permit a contract to be made releasing a carrier from liability to a passenger for its negligence."

After having thus stated the question, the court proceeds in delivering its opinion, as follows:

"Each of the parties is a common carrier for the public, and the railroad company is not bound to furnish facilities to every express company that applies for carrying on its business on its road. It is not charged with the duty of carrying express companies at all, *and is, therefore, entitled to make a special contract establishing the duty and liability of the railroad on its side, and of the express company on the other.*" (Italics ours.) "The Supreme Court of the United

States so held in the Express Cases, 117 U. S. 1, and pointed out the reasons why special contracts in reference to such business are necessary. A railroad company takes an express company on its road by virtue of a special contract, in which the rights and duties of the parties are defined in such manner as, in the opinion of the parties, will be most suitable or beneficial to them. Such a contract gives to the express company rights superior to other express companies and to the general public, which it has no right to demand, and which the railroad company is under no obligation to furnish except upon terms agreeable to it. In this instance such a contract was made, by virtue of which the express company's goods and the plaintiff, as its employe, were upon the car, carrying on the business of the express company as a common carrier. Plaintiff was being carried for the sole purpose of handling and caring for the express company's goods, which were being carried under the terms of the special contract, and which the defendant was not otherwise bound to carry at all. The question whether, under such circumstances, a contract relieving the carrier from liability for negligence merely is valid, has several times been considered."

The court then refers to the cases that we have heretofore cited—*Bates* v. *Railroad Co.*, 147 Mass. 255; *Railroad Co.* v. *Keefer*, 146 Ind. 21; *Railroad Co.* v. *Mahoney*, 148 Mass., and then proceeds as follows:

"The contract gave the express company, and plaintiff, as its messenger, rights which defendant, as a common carrier, could not have been compelled to grant; and in such a case the carrier may contract as a private carrier, and require exemption against liability for negligence as a condition of granting such rights. An agreement to take and carry property in such a case, under such conditions as the parties agreed upon, is held not to be against public policy. As against these decisions we are not referred to any de-

cision of a court of last resort, and the only opinion to the contrary cited by counsel is one by Judge Taft, passing upon a demurrer to an answer in a trial court (that is this case). In that opinion the judge expressly disapproves of the decisions of the Supreme Court of Indiana and reaches the opposite conclusion by the following course of reasoning."

The court then states the reasoning of the learned circuit judge in passing upon the demurrer in this case, pretty much as has been already stated to this court, and then says:

> "We do not see how it could follow that because a person who is an express messenger might be a passenger in a passenger car is also a passenger while doing his employer's business in the express car. The reasoning of the other courts seems to us the sounder and better. An attempt is made to liken this case to the case where a person is carried with his stock of goods and where he is regarded as a passenger. There are many such cases where the carrier is bound to receive and carry goods or stock, and where by general usage, or by the rules of a company, the owner or his agent may go, or is required to go, in the charge of the property. In such case the owner is entitled to demand the carriage of his property as a part of the duty of the railroad company towards the public as a common carrier, under the conditions fixed by the law. The railroad company is bound to receive and to carry for anybody who shall appear, and by the rules or usage of the company the charge for carrying the stock includes the carrying of the person in charge. Such a person is a passenger. But the difference in the relation between such a case and this is apparent. . . . The judgment of the Appellate Court is affirmed."

Magruder, J., dissented and concurred in the opinion of Judge Taft on the demurrer.

II.

CASES CITED BY COUNSEL FOR DEFENDANT IN ERROR INTENDED TO SHOW THAT BECAUSE THE RAILWAY COMPANY HAULED THE EXPRESS CAR IN A PASSENGER TRAIN THEREBY IT BECAME A PASSENGER CARRIER OF THE EXPRESS MESSENGER.

Hannibal Railroad v. *Swift*, 12 Wall. 262, is the first case cited by our opponent for the above purpose; that case, as we submit, proves nothing. In the early stages of the civil war a portion of the garrison at Ft. Randall, Dakota, was to be moved thence to Cincinnati. When the soldiers and officers, with their baggage and camp equipage, reached the city of St. Joseph, on the western limit of the State of Missouri, it was found that the railroad running thence to Hannibal, on the eastern limit of the state, was beset by bands of armed men, and that many trains had been attacked and destroyed on the line. For that reason, and for that reason only, the railroad company was unwilling to fix any price to be charged for the carriage of the soldiers, their baggage and equipage, until the train should have safely reached its destination, Hannibal. At the city of St. Joseph, the officer in command of the soldiers went to the yards of the railroad company and selected a stout car into which, with the consent of the railroad company, he caused to be loaded the baggage and camp equipage of the soldiers and officers, and put a squad of soldiers with their guns in charge of the car to protect it from the depredation of the armed bands. This car containing this baggage and camp equipage was put into the passenger train, and the officers and soldiers were carried in the passenger coaches of the same train. On the journey the coach containing the equipage and baggage took fire and the baggage was destroyed. The action was brought by Dr. Swift, surgeon in the United States Army, who was one of

the command moving as aforesaid from Ft. Randall to Cincinnati, to recover the value of his baggage which was lost in the above-mentioned fire.

The question was whether the railway company under the circumstances had received the baggage as a common carrier and was liable as such therefor? This court held that it was liable, and that it had received the baggage as a common carrier. The railroad company, it should be observed, on arrival of the train at Hannibal, accepted compensation for the carriage of the soldiers and their baggage and their camp equipage. The reasons for the decision are obvious and distinguish that case from the one now under consideration. These reasons are (1) the railroad company was a common carrier of the persons and of their baggage; (2) the railroad company recognizing this to be its duty as a common carrier, on demand of the commanding officer, "furnished transportation for the troops, their baggage, camp equipments, arms, munitions of war, and the chattels of himself as well as those of the plaintiff" (see Finding of Facts, p. 263); (3) the railroad company made no attempt to limit its liability for the safe carriage of the car and contents; (4) the only reason why the military baggage and trappings were not put into the ordinary baggage car was the disturbed condition of the country, rendering the services of an armed guard necessary, not generally, but only for that particular occasion; (5) the railroad company was in the performance of a duty which it was bound by law to perform. While in the present case it is admitted by counsel for defendant in error that the railway company was under no obligation except by reason of its contract. (See his first brief, p. 4 and p. 37.)

In *Hannibal Railroad Co.* v. *Swift*, Justice Field, speaking for the court, of the duty of the railroad company to transport the soldiers and their baggage and camp equipage, used this language:

> "Its obligations and liabilities in these respects were not dependent upon a contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract." (See p. 270. See also observations of the court, pp. 271, 272.)

Mallory v. *Tioga Railroad Co.*, 39 Barbour, 488, is also cited by counsel for defendant in error. It is obvious that that case has no application. The railway company was hauling cars of the plaintiff, a miner, loaded with his coal. The act of Pennsylvania, under which the railway company was incorporated, required it to haul coal or other commodities in cars of the shippers; so that the railway company was performing in that case a service which by law it was obliged to perform. The action in the case was for coal lost in course of carriage by negligence of the railway company. The court made the following pertinent observations:

> "It is apparent from this statement not only that the carriage of loaded cars belonging to others over the defendants' road for hire, was a part of the business expressly authorized by the act of their incorporation, and provided for by their agreement with the Corning and Blossburgh Company, but that they had been engaged in thus transporting cars for the plaintiff during several months prior to their undertaking to carry the train in question.
>
> But independently of the special provisions of the act of incorporation and the agreement above referred to, I am of the opinion that the defendants' undertaking was in the line of their general business." (See pp. 491, 492.)

And again the court said:

> "Yet if, as is claimed by them" (the railway company), "they simply entered into a special engagement outside of their general business, to provide the plain-

tiff with sufficient motive power to draw his cars over their road, under the care and control of his servants, they did not thereby assume the obligations of carriers. But the case proved is, in my judgment, materially different from the one thus hypothetically stated."

The one hypothetically stated, it is to be observed, is our case.

Lackawanna and Bloomsburg Railroad Co. v. *Chenewith*, 54 Pa. St. 382, is also cited by defendant in error, but it is clearly distinguishable from this case. There Chenewith, by urgent solicitation of the operatives of a passenger train on the railway, got them to attach his market car to the passenger train, he agreeing "to run all risk." Chenewith, while standing on the platform of a passenger car of the train, *and not on his own car*, was thrown off, and sustained injuries for which suit was brought. His being thrown off was caused by the engine running against a cow on the track. The court held that his agreeing "to run all risk" only meant that he should run all risks occasioned by his car being attached to the passenger train, and that the accident was not such risk.

III.

COUNSEL FOR DEFENDANT IN ERROR SEEMS FINALLY TO FALL BACK UPON AN ALLEGED PROPOSITION THAT NO PERSON CAN LAWFULLY ENTER INTO A CONTRACT TO RELIEVE HIMSELF FROM LIABILITY FOR INJURY OCCASIONED A THIRD PERSON BY THE NEGLIGENT ACT OR OMISSION OF A SERVANT OR AGENT.

It becomes of consequence, therefore, to ascertain whether there is such rule. Counsel has cited a number of cases which are claimed to support it. Most of them are cases in which the contract to procure exemption from neg-

ligence was admitted to be made with a passenger for hire. The others are cases similar to *Railroad Co.* v. *Spangler*, 44 Ohio St. 471, and rest upon the grounds upon which that case rests. That case is one of a class holding that where the policy of the law has established the rule that a common carrier is libale to its employes for the negligence of certain other of its employes—for example, in Ohio, those placed in authority over the injured employe—it is not competent for the company to relieve itself, for the reason that such special liability is not imposed for the benefit of the individual employe nor for the benefit of all the employes, but is imposed for the protection and benefit of the public who have occasion to deal with corporations. In *Railway* v. *Spangler*, the Supreme Court hold:

> "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements." (See p. 479.)

The public policy spoken of in the above quotation is that public policy which prohibits a common carrier from relieving itself by contract from liability for its own negligence. If there were a general principle of law such as is claimed by opposing counsel, the courts would not be found confining the incompetency to make such contracts to that class of persons engaged in public employment, to wit: common carriers and the like, but would have laid

down the proposition as being of general application to all persons howsoever engaged.

Further, if any such rule of law claimed by counsel for defendant in error exist, the judgment of this court in *Hart* v. *Pennsylvania Railroad Company*, 112 U. S. 331, is manifestly wrong; for in that case the carrier was allowed by stipulation to limit his liability to an agreed valuation for loss of a horse shipped over the road, the rate of compensation being based upon the agreed valuation. From the report of the case it is manifest that it was admitted that the loss of the animal was due to negligence. If such general rule of law has existence, as is claimed by counsel on the other side, the cases of *Coope* v. *Wabash, etc. Ry. Co.*, 56 Mich. 111; *Chicago, etc. Ry. Co.* v. *Wallace*, 66 Fed. Rep. 509; *Robinson* v. *Old Colony R. R. Co.*, 156 Mass. 525; *Bates* v. *Old Colony R. R. Co.*, 147 Mass. 255; *Hosmer* v. *Old Colony R. R. Co.*, 156 Mass. 506; *Louisville, etc. Ry. Co.* v. *Kiefer*, 146 Ind. 21; *P. C., etc. Ry. Co.* v. *Mahoney*, 148 Ind. 196 (cited in former briefs in this case), and *Blank* v. *Illinois Cen. R. R. Co.*, 55 N. E. Rep. 332, were all wrongly decided.

This right to stipulate against liability for negligence of servants and agents was decided in the case of *Hartford Insurance Company* v. *Chicago, Wilwaukee & St. Paul Ry. Co.*, 70 Fed. Rep. 201 (cited page 17 of our first brief), where it was held that a stipulation in the lease by a railroad company of a part of its right of way, whereby the lessee agrees that the railroad company should not be liable for injury to or destruction of any property placed upon such portion of the right of way, whether the same was caused by negligence or not, was valid. That case has been recently affirmed by this court in an opinion delivered by Mr. Justice Gray, November 6, 1899.

While it is not in the power of persons who enter into a contract that necessarily contemplates a violation of law to thereafter claim release from responsibility by virtue of such

contract, yet a principal may, in many cases, and this is one of them, be protected against the negligent acts and omissions of agents and employes in respect of matters which can only be performed by the principals through the instrumentality of employes.

It is well said in the case of *Quimby* v. *Boston & Maine R. R.*, 150 Mass. 371:

> "It is well known, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention."

A more extended discussion of the subject of public policy will be found in our first brief, pages 14 to 19.

The only cases which opposing counsel is able to find that seem to sustain the proposition he makes are *Johnson, Adm'r*, v. *R. R. Co.*, 86 Va. 975, and *Roesner* v. *Hermann*, 8 Fed. Rep. 782. It is sufficient to say of these cases that they do not represent the law. See p. 4 (bottom) of opinion of Mr. Justice Gray in *Hartford Fire Insurance Co.* v. *The Chicago, Milwaukee & St. Paul Railway Co.*

Respectfully submitted,

EDWARD COLSTON,

Attorney for Plaintiff in Error.

December 22, 1899.